

BACKGROUND

Colorado's state civil service system was established as part of the State Constitution in 1918, in a time long before comprehensive federal laws such as the Fair Labor Standards Act, the Hatch Act, the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and their counterparts in state law. While the world has changed substantially since 1918, the Colorado civil service system has not.

Our first state civil service system was created by statute in 1907.¹ Under that system, the Governor appointed a volunteer three-person Civil Service Commission, which made and enforced rules regarding classification, selection, compensation, and discipline for what was then a small workforce – in 1916, the State employed only 916 classified employees.² Another 1,237 employees were either “unclassified” or exempt, of whom 102 were employed by the legislative branch, 184 by the judicial branch, and 517 by educational institutions.³ The single largest employer was the University of Colorado with 228 (34 classified, 194 other), followed by the State Hospital with 159 (135 classified, 24 other), the State Agricultural College (now Colorado State University) with 146 (23 classified, 123 other). After these major state institutions, the next largest employer was the Board of Stock Inspection Commissioners, with 140 (131 classified, 9 other). By comparison, the State Penitentiary only had 59 staff (57 classified, two other).

In 1918, William W. Grant, Jr. and Henry van Kleeck of the Denver Civil Service Reform Association authored a detailed constitutional Civil Service Amendment, which was then placed on the ballot by citizen initiative. The petition drive characterized the issue as “merit system vs. spoils system;” specifically that appointments should be made on the basis of “fitness” and that employees should enjoy “permanency of employment” during “efficient” service.⁴ Although there is little information compiled regarding the election campaign, newspaper reports noted that the statutory system had been called a “bogus civil service measure” because every new Governor could appoint an all-new Civil Service Commission.⁵ The constitutional amendment was urged because it would “place the Colorado state government on a business-like basis by applying the merit system to appointments in the civil service of the state.”⁶

The constitutional civil service system was adopted by a vote of 75,301 to 41,287 (64.6% to 35.4%). Its major provisions included:

- A civil service system covering all positions except the General Assembly, the Judiciary, elected officials and their immediate staffs, teachers, attorneys, the Public Utilities Commission, and the Civil Service Commission;
- Employment in the civil service system based upon merit and fitness;

¹ Colo. Rev. Stat. ch. 26 (1908).

² Biennial Report of the Civil Service Commissioners (1916), pp. 20-24.

³ These figures include all elected and appointed officials, such as legislators and judges.

⁴ Petition, “Civil Service Amendment to the Constitution” (1918).

⁵ “New Measures Placed on Ballot for Voters to Pass on Tuesday,” Rocky Mountain News (Nov. 3, 1918).

⁶ “Merit Basis Seen As Cure For State Business Laxity,” The Denver Post (Nov. 5, 1918).

- The person scoring highest on a competitive test is appointed;
- All persons appointed must be eligible to vote;
- Employees hold positions during efficient service;
- Three-person Civil Service Commission, all appointed by the Governor to staggered six-years terms, adopts all rules, administers test, hears cases, and establishes job classes;
- Employees entitled to disciplinary hearings before the Commission; and
- All current state employees immediately brought into new system.

In 1938, Governor Ralph Carr commissioned an independent study by a consulting firm to evaluate the organization and efficiency of Colorado state government. With respect to the civil service, the report concluded that after only two decades, “the purpose of securing for the state the best and most efficient service possible has been defeated by inability to change the outmoded machinery.”⁷ The report also noted that there were 48 independent and semi-independent state officers and agencies, and found that “most of them do about as they please and some of them even go so far as to disregard the authority of the governor as executive head of the department.”⁸ The General Assembly subsequently passed the State Reorganization Act, which was the first broad effort to improve the efficiency of state government.⁹

The 1918 amendment remained unchanged until 1944 when, in the latter stages of World War II, Colorado voters added a veteran's preference to the Civil Service Amendment. The preference, which also extended to counties and municipalities, was provided to combat veterans, widows of veterans, and disabled veterans of the Spanish-American War, the “Philippine Insurrection,”¹⁰ World War I, and World War II.

In 1956, Governor Edwin C. Johnson supported a constitutional amendment to, among other things:

- Exempt six “confidential employees” of the Governor's Office, teachers and officers of educational institutions and, if the General Assembly statutorily authorizes it, the State Controller and the heads of the Departments of Revenue, Institutions, and Purchasing;
- Eliminate the examination requirement for promotions;

⁷ Griffenhagen & Associates, *Report on the Administrative Organization and Functions of the State Government of Colorado, Personnel Administration* (Jan. 6, 1939) at 2.

⁸ Griffenhagen & Associates, *Report on the Administrative Organization and Functions of the State Government of Colorado* (July 13, 1938) at 8, quoted in Legislative Council of the Colorado General Assembly, *Reorganizing the Executive Branch of Colorado State Government*, Research Pub. No. 131 (Dec. 1967) at viii.

⁹ Carr is perhaps best known for his efforts during World War II to combat discrimination and the federal government's efforts to imprison and persecute Japanese-Americans, thereby sacrificing his political career. See Richard D. Lamm and Duane A. Smith, *Pioneers and Politicians: Ten Colorado Governors in Profile* (1984).

¹⁰ During the Spanish-American War, an insurgent army of native Filipinos secured control of several islands. Over 120,000 American soldiers put down the rebellion after four years of guerilla war.

- Require a six month probationary period;
- Eliminate the requirement that employees be eligible to vote; and
- Make some changes to how Civil Service Commissioners were appointed, their terms of office, made and enforced their rules.

It was defeated by a vote of 32% to 68%, apparently based upon concerns that the changes would weaken the strength and independence of the Civil Service Commission.¹¹

The following year, the new Governor, Stephen L.R. McNichols, commissioned an independent study to examine the civil service system in detail. That study concluded that, among other things, the “rule of one” needed to be expanded, a probationary period was needed, open-ended temporary appointments (called “provisional appointments”) needed to be limited, and exemptions needed to be expanded.¹²

Based upon the study's findings, Governor McNichols advocated changes to the Civil Service Amendment on the ballot in 1958 and 1960. The 1958 measure would have, in part:

- Eliminated the “rule of one” and permit the number to be determined by statute;
- Limited provisional appointments (filling a permanent position with a temporary employee while an eligible list for the appointment is being obtained) to eight months;
- Grandfathered in as permanent employees all temporary employees who had served at least two years;
- Eliminated the requirement that employees be eligible to vote;
- Created the position of state personnel director, to be appointed by the Civil Service Commission;
- Expanded exemptions to include employees of the Department of Education, the State Historical Society, faculty at state institutions; the Governor's secretary, administrative staff, and four “confidential employees;” and nine department heads, as provided by law;
- Required the General Assembly to establish pay ranges based upon prevailing compensation in other public and private employment;
- Limited the veteran's preference in promotions; and
- Allowed the Governor to veto rules adopted by the Civil Service Commission.

¹¹ Legislative Council of the Colorado General Assembly, *An Analysis of Ballot Proposals*, Research Pub. No. 18 (1956); R.D. Sloan, Jr., *Proposed Amendments, Referred and Initiated, to the Colorado Constitution, 1946-1976*, Bureau of Governmental Research and Service, University of Colorado at Boulder (Feb. 1978).

¹² Louis J. Kroeger and Associates, *Colorado's State Personnel Program: A Preliminary Report to Stephen L.R. McNichols, Governor of Colorado* (Dec. 1957), at 67-68.

This proposal was narrowly defeated by a vote of 49% to 51%, primarily on the argument that overall these reforms would give too much authority to the Governor.¹³ Undaunted, Governor McNichols returned in 1960 with a modified proposal to:

- Eliminate the “rule of one” and permit the Civil Service Commission to determine the number;
- Require a twelve-month probationary period;
- Eliminate the examination requirement for promotions;
- Eliminate the requirement that employees be eligible to vote;
- Expand exemptions to include the State Land Board, administrative staff in the Governor's Office, one secretary for each elected official, and part-time employees;
- Eliminate exemptions for teachers at state schools outside of higher education, such as the School for the Deaf and the Blind; and
- Make some changes to the appointment of the Civil Service Commissioners, their terms of office, and how their rules are made and enforced, similar to those proposed in 1956.

The proposal was rejected by the voters, 39% to 61%, with the opponents arguing that it sought to change things that did not need to be changed, while leaving undisturbed things that did need revision.¹⁴

Although proposed amendments had been defeated in three successive elections, the civil service had become a focus of public policy discussion and debate which would build over the following decade. In 1962, the Legislative Committee on Organization of State Government began an extended study of the organization of the executive branch, including the state civil service system, which led to a 1966 ballot measure. The referendum required the reorganization of 130 state offices and agencies into no more than 20 cabinet departments, in part because no governor “can reasonably be expected to provide effective leadership and supervision over the development and administration of these various programs.”¹⁵ The voters overwhelmingly approved the new § 22 of Article IV of the Constitution by a 70% to 30% margin.¹⁶

Two years later, the General Assembly passed, and Governor John A. Love signed, the Administrative Organization Act of 1968,¹⁷ the first comprehensive reorganization since Governor Carr's groundbreaking initiatives in the early 1940's. This law, which created 17

¹³ Legislative Council of the Colorado General Assembly, *An Analysis of Ballot Proposals*, Research Pub. No. 23 (1958); R.D. Sloan, Jr., *Proposed Amendments, Referred and Initiated, to the Colorado Constitution, 1946-1976*, Bureau of Governmental Research and Service, University of Colorado at Boulder (Feb. 1978).

¹⁴ Legislative Council of the Colorado General Assembly, *An Analysis of Ballot Proposals*, Research Pub. No. 37 (1960); R.D. Sloan, Jr., *Proposed Amendments, Referred and Initiated, to the Colorado Constitution, 1946-1976*, Bureau of Governmental Research and Service, University of Colorado at Boulder (Feb. 1978).

¹⁵ Legislative Council of the Colorado General Assembly, *An Analysis of Ballot Proposals*, Research Pub. No. 110 (1966).

¹⁶ R.D. Sloan, Jr., *Proposed Amendments, Referred and Initiated, to the Colorado Constitution, 1946-1976*, Bureau of Governmental Research and Service, University of Colorado at Boulder (Feb. 1978).

¹⁷ Colo. Sess. L. 1968, ch. 53.

departments, established the essential departmental structure still followed by Colorado government to this day. The Legislative Committee also began preparing a proposed constitutional amendment regarding the state civil service. The following year, Governor Love appointed a group of business leaders as a Committee on Efficiency and Economy, to study and recommend improvements to the operation of state government. The results of this Committee's work were incorporated into the draft, which the General Assembly then referred to the voters at the 1970 general election.

The 1970 changes appeared in the form of two separate amendments: a narrower one to exempt all department heads – allowing the Governor, for the first time, to select his own cabinet – and a broader one, to:

- Replace the “rule of one” with a “rule of three”;
- Replace the three-member Civil Service Commission with a five-member State Personnel Board to regulate and conduct hearings and a State Personnel Director appointed by the Governor to administer the system;
- Require a twelve-month probationary period;
- Limit temporary appointments to six months;
- Replace the requirement that employees be eligible to vote with a residency requirement;
- Establish division directors as the appointing authorities for employees within their divisions;
- Exempt the members of the State Parole Board and the Board of Assessment Appeals; and
- Extend the veteran's preference to persons serving in Korea and Vietnam, eliminate the preference in promotional examinations, but add a preference in layoffs.

The first proposal passed by a vote of 57% to 43%, while the second passed by a margin of 66% to 34%.¹⁸

At the time, almost all of the non-professional work force of the public institutions of higher education was within the state civil service, with the notable exception of the University of Colorado. In November 1972, the voters approved an amendment to Article VIII, § 5 of the Colorado Constitution. In two ways, the amendment placed all state higher education institutions on a more equal footing, eliminating the unique constitutional status the Board of Regents had enjoyed since 1876. First, the other major state educational institutions were elevated to constitutional status, granting powers of general supervision and control of funds. Second, the General Assembly was vested with broad power to establish the parameters within which the governing boards may operate.

¹⁸ Legislative Council of the Colorado General Assembly, *An Analysis of Ballot Proposals*, Research Pub. No. 151 (1970); R.D. Sloan, Jr., *Proposed Amendments, Referred and Initiated, to the Colorado Constitution, 1946-1976*, Bureau of Governmental Research and Service, University of Colorado at Boulder (Feb. 1978).

Soon thereafter, officials of the University of Colorado asked Attorney General John Porfilio Moore¹⁹ for guidance regarding the effect of this change upon their employees. The Attorney General determined that the constitutional amendment caused the Regents to be subject to the same higher education laws as other governing boards,²⁰ and that a pre-existing statute which included all other non-professional higher education employees in the civil service²¹ now applied to the University of Colorado.²² Based upon this, the University of Colorado began transitioning its non-professional staff into the state civil service.

In 1976, a measure was referred to the ballot to exempt the personal secretary to the Executive Director of each principal department and to allow the General Assembly to exempt by law the heads of state agencies from the personnel system. The proponents argued that the change would make government – especially the Governor – more accountable and responsive to the public. The opponents argued that, even though only about 100 positions would be affected, it would create a “spoils system,” and the measure was defeated by a vote of 24% to 76%.

In 1983, Governor Richard D. Lamm appointed a task force to examine the problem of “the dual personnel system (e.g., classified and non-classified) in the institutions of higher education,” and “to develop some solutions that meet the many concerns of all those in the higher education community.”²³ The group reported back that constitutional change was needed as well as the following statutory changes:

- Fully fund the annual salary survey, along with allowing geographic pay differentials;
- Authorize governing boards to establish salaries for classified employees;
- Authorize institutions to furlough classified staff and contract out for certain services; and
- Allow governing boards to define exempt positions.²⁴

That same year, the General Assembly tasked Assistant Attorney General William Levis with examining the merits system in Colorado and other States, and to propose changes.²⁵ Levis’ report, which provided an extensive menu of possible constitutional amendments ranging from modest updating to wholesale elimination of all but the merit principle itself, is one of the most extensive and thorough treatments of the topic to date.

In 1986, the General Assembly referred a potentially far-reaching measure to the voters. Among other things, it would have: abolished the State Personnel Board; empowered the State

¹⁹ Now Senior Judge, U.S. Court of Appeals for the Tenth Circuit.

²⁰ Colo. A.G. Op. No. 73-0014 (Apr. 2, 1973).

²¹ Section 26-1-1(1), C.R.S. (1963), now § 24-50-101(1), C.R.S.

²² Colo. A.G. Op. No. 73-0042 (Dec. 12, 1973).

²³ Colorado Legislative Council, Committee on the Personnel System, *Recommendations for 1984*, Research Pub. No. 283 (Dec. 1983) at 60.

²⁴ *Id.*

²⁵ Levis, *Report to the Colorado General Assembly: Modernizing the Colorado Personnel System* (Jan. 1984).

Personnel Director to make all rules regarding the system; allowed the General Assembly to provide exemptions by statute; repealed the residency requirement; and extend temporary appointments to 12 months. The supporters urged that the resulting system would be more efficient, more adaptable to changing conditions, and would result in a more accountable state government. The opponents charged that the changes would eliminate too much protection for employees and could end up making the system too political. The proposal was supported by all three living former governors (McNichols, Love, Vanderhoof), the current governor (Lamm), and the two candidates for governor (State Treasurer Roy Romer and State Senate President Ted Strickland), but employee organizations and the State Personnel Board were divided. After a close campaign which saw the amendment leading in the polls until the closing weeks, the measure was narrowly defeated by a vote of 49% to 51%.

Two years later, Governor Roy Romer established a Commission on Privatization to establish criteria for the evaluation of potential outsourcing of government services and formulating policy guidelines for evaluating privatization proposals.²⁶ Based upon that Commission's recommendations, Governor Romer issued a follow-up order the next year directing his cabinet to review their services to determine suitability for privatization. He determined that the following types of services were appropriate to privatize:

- Services which were new or lacked a long tradition of public provision;
- Seasonal or sporadic services;
- Services that are essentially commercial and for which there are readily available private providers; and
- Situations or geographic areas where significant cost savings or enhanced efficiencies can be achieved through contracting.

At the same time, Governor Romer also determined that the following types of services were not appropriate to privatize:

- Core functions of government;
- Services which are not readily available from the private sector;
- Services which cannot be efficiently measured as to cost, quality, process, and outcomes;
- Services for which there are legal barriers to privatization; and
- Services whose privatization would adversely affect current state employees, unless the effects can be mitigated.²⁷

In 1989, the General Assembly provided for the reorganization of the University of Colorado Hospital into a private nonprofit corporation and required current employees to give up their civil service rights.²⁸ In 1990, the Supreme Court declared the law to be an

²⁶ Executive Order No. B-018-88 (Feb. 5, 1988).

²⁷ Executive Order No. D-109-89 (Feb. 24, 1989).

²⁸ Formerly §§ 23-21-401, *et seq.*, C.R.S., since repealed.

unconstitutional attempt to circumvent the merit system.²⁹ The following year the General Assembly revised the law, adding a provision that gave current employees the option of remaining state employees or becoming corporate employees.³⁰

In 1991, the Colorado Supreme Court declared that attempts to outsource services commonly or historically provided by classified employees were impermissible.³¹ The following year, a Department of Personnel task force issued a report and made recommendations for how to proceed with essential government functions in light of court decisions invalidating the contracting statutes and procedures. In 1993, the Supreme Court invalidated an attempt by the General Assembly to outsource custodial services which displaced certified employees.³²

Also in 1993, the General Assembly passed House Bill 93-1212, which established a comprehensive legal structure to validate the lion's share of contracting then being done by the State.³³ In 1996, the General Assembly established a privatization commission to study and make recommendations concerning privatization of services performed by classified employees.³⁴ After extensive study, that commission made several recommendations:

- Create a permanent Commission on Government Efficiency to determine privatization feasibility on an ongoing basis;
- Institute a reliable and complete cost accounting function throughout state government;
- Initiate competitive market testing;
- Permit state agencies to prepare work proposals and submit bids to compete with private bidders (managed competition);
- Increase the use of performance-based contracting and effective monitoring of contractor performance; and
- Create labor-management cooperation councils to advise state agencies regarding managed competition and privatization.³⁵

In 1997, the State Auditor conducted a performance audit of the system and recommended, among other things, that the "rule of three" be expanded, and temporary appointments be extended beyond six months. The Department of Personnel agreed and further suggested moving the bulk of the current Civil Service Amendment out of the Constitution and into statute.³⁶ The Attorney General followed up with an extensive analysis and endorsement of the lion's share of the State Auditor's recommendations.³⁷

²⁹ *Colorado Ass'n of Public Employees v. Board of Regents*, 804 P.2d 138 (1990).

³⁰ See § 23-21-501, C.R.S.

³¹ *Colorado Ass'n of Public Employees v. Department of Highways*, 809 P.2d 988 (Colo. 1991).

³² *Horrell v. Department of Administration*, 861 P.2d 1194 (Colo. 1993).

³³ This law was modified slightly two years later. See Colo. Sess. L. 1995, ch. 52.

³⁴ House Bill 96-1262.

³⁵ Commission on Privatization, *More Competitive Government: A Report to the General Assembly* (Dec. 1997).

³⁶ *Report of the State Auditor: Department of Personnel Performance Audit* (Nov. 1997), at 43-59.

³⁷ Letter of Attorney General Gale A. Norton to State Senator Tillman Bishop (Feb. 2, 1998).

In 2002, the Legislative Audit Committee issued a critical report on the process for determining the appropriateness of exempting positions from the civil service system at institutions of higher education. Citing the inefficiency of the current process, the report directed the Department of Personnel & Administration and the Department of Higher Education to, among other things, “evaluate the current higher education personnel system, as well as alternatives to this system, to determine which would best meet the needs of higher education and the State as a whole, and seek statutory and constitutional changes as needed.”³⁸

Today, the state civil service encompasses over 31,000 employees, of whom roughly 69% are in general government agencies, with the remaining 31% employed by institutions of higher education. The 3000 people employed by the Department of Transportation, and the 5500 employed by the Department of Corrections, utterly dwarf the payroll of the old Board of Stock Inspection Commissioners. In addition, the range of duties performed by state employees have outstripped what could have been imagined by those adopting the 1918 amendment: typing pools and a Commissioner of Public Printing have given way to information technology experts and a vast array of human services professionals. What was said only twenty years after the adoption of the Civil Service Amendment is even more true today: “The friends of the merit system had gained their point of removing the merit system from legislative tampering, but in doing so, as will be pointed out, they so immunized to change the system as established, that the march of progress has since rendered it obsolete to a large extent.”³⁹ Colorado’s highly professional and dedicated state workforce is not well-served by the current system, and if the State expects to attract and retain quality employees in the years to come, reform is necessary.

³⁸ *Report of the State Auditor: Higher Education Personnel Exemption Process* (Sept. 2002), at 28.

³⁹ Griffenhagen & Associates, *Report on the Administrative Organization and Functions of the State Government of Colorado, Personnel Administration* (Jan. 6, 1939) at 1.